IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS.41 AND 46 OF 2002

CRIMINAL APPEAL NO. 41 OF 2002

Subhash Ganesh Volvoikar,
r/o H.No.45, Rumoda,
Pale, Bicholim. ... Appellant.

versus

S T A T E
through the Public Prosecutor. ... Respondent.

Mr. S. G. Bhobe, Advocate for the Appellant.

Mr. S. N. Sardessai, Publiic Proseecutor for the State.

CRIMINAL APPEAL NO. 46 OF 2002

Pandurang @ Pandu Hari Gawde,
resident of House No.66,
Panshem, Sattari-Goa. ... Appellant.

versus

S T A T E
through the Public Prosecutor. ... Respondent.

Mr. Arun Bras De Sa, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 3RD JULY, 2003.

ORAL JUDGMENT

The Appellant/Original Accused No.1 in Criminal Appeal No.41 of 2002 stands convicted for an offence punishable under Sections 143, 147, 148 and 304(Part I) of the Indian Penal Code and is sentenced to suffer Rigorous Imprisonment for 3 months and to pay fine of Rs.200/- in default Simple Imprisonment for 15 days, Rigorous Imprisonment for 6 months and to pay fine of Rs.500/- in default Simple Imprisonment for 1 month, Rigorous Imprisonment for 1 year and to pay fine of Rs.700/- in default Simple Imprisonment for 2 months, Rigorous Imprisonment for 3 years and fine of Rs.1000/- in default Simple Imprisonment for 3 months, respectively, for the offences stated above.

2. The Appellant in Criminal Appeal No.46 of 2002, is the Original Accused No.5, who stands convicted for an offence punishable under Sections 143, 147, 148 and 427 of the Indian Penal Code and is sentenced to suffer Simple Imprisonment for 1 month and to pay fine of Rs.200/- in default Simple Imprisonment for 7 days, Simple Imprisonment for 3 months and to pay fine of Rs.500/- in default Simple Imprisonment for 15 days, Simple Imprisonment for 6 months and fine of Rs.700/- in default Simple Imprisonment for 1 month, Simple Imprisonment for 1 year and fine of Rs.1000/- in

default Simple Imprisonment for 1 1/2 months, respectively, for the offences stated above.

3. The substantive sentences of both the Appellants have been directed to run concurrently. The aforestated conviction and sentence was passed by the Additional Sessions, Judge, North Goa, Panaji, by his Judgment dated 21st May, 2002, in Sessions Case No.23 of 1999. Since the Appellants are the Original Accused in the said Sessions Case and have been convicted by the said Judgment, both the Appeals are being decided by this common Judgment.

4. The Appellants along with 19 others were prosecuted for an offence punishable under Sections 120-B, 143, 147, 148, 342, 302, 307 and 427 of the Indian Penal Code. Charge vide Exh.8 for the aforestated offences was framed by the Additional Sessions Judge, North Goa, Panaji. The Appellants and the other Accused denied their guilt and claimed to be tried.

5. The prosecution alleged that on 26th December, 1998, at about 6 p.m., at Par Usgao, the Accused who were striking workers of Chowgule and Company and Members of the Union of C.I.T.U. and villagers of Panshem, armed with deadly weapons

wrongfully restrained deceased Balkrishna Salunke, Deputy General Manager and P.W.40, Vijay Pande, General Manager of Chowgules, while the said two persons were returning in a jeep from Pale Mines and going to Ponda, pelted stones on them, damaged the jeep and assaulted them with iron rods and dandas causing them serious injuries as a result of which Balkrishna Salunke expired and Vijay sustained grievous injuries. The prosecution in order to establish its case examined 90 witnesses out of which, 43 witnesses did not support the prosecution case.

6. There are two eye witnesses to the incident who are P.W.2, Agostinho Fernandes and P.W.40, Vijay Pande. P.W.2, Agostinho Fernandes, has stated that after attending the wedding, he was going with his friend Francisco Gomes on a scooter in order to deliver a tiffin to a priest and he was driving the scooter proceeding to Usgao via E-merck road. On the road, where there is a sharp turn to the right, he saw a Layland truck facing Ponda and parked in such a way that half the road was blocked and due to this, he could not see the traffic coming from the opposite direction and, therefore, he slowed down the vehicle and while slowing down the vehicle and from behind the truck, he heard sounds like breaking the glass and sounds like hitting the metal sheets. All of a sudden,

from behind the truck, a jeep came and overtook the parked truck. He noticed that the glass panes of the jeep were broken and the glasses on the sides were also broken. Seeing the jeep, he took his scooter on the left. The pillion rider, Francisco Gomes, prepared to jump from the scooter and due to this, the balance of the scooter was disturbed as a result of which, the scooter skidded on the road and fell. P.W.2, Agostinho Fernandes, and the pillion rider both ran and he saw that the scooter had gone underneath the jeep and he saw two persons armed with iron rods in their hands beating the two occupants in the jeep. One person from the two armed persons climbed on the bonet of the jeep and started hitting the iron rod on the remaining portion of the front glass. The said two armed persons removed the occupants from the jeep and took them to the road and started hitting them with iron rods. He also noticed that one of the armed persons had a mask on his face and the mask was made of a dirty cloth. He also saw the said two assailants going from the place of the incident in a jeep parked at a distance of 40 metres.

7. P.W.40, Vijay Pande, has stated that at the relevant time there were two Unions, one affiliated to BMS having a strength of 150 workers and the other Union affiliated to CITU having a strength of 221

workers. An agreement signed at the instance of BMS on 17th March, 1997 was not accepted by the workers attached to the CITU. As a result of that, the workers of the Union affiliated to CITU approached the management with a request that they be considered for pay revision without the workers being required to sign a document "Annexure C". The management informed the workers that the workers would be required to sign the said documents and only then the benefits under the agreement would be extended to them. Since this was not agreeable to the workers of the Union affiliated to CITU, the workers went on a token strike of two days. Show Cause Notices were given to the workers which they refused to accept and ultimately they were then displayed on the Notice Board. He has referred to the various incidents and has stated that on 26th December, 1998, he started from his residence from Ponda at about 8 a.m. and collected deceased Balkrishna from his residence and then both of them proceeded to Pale for normal work. After crossing the Tisk bridge, he saw one grey colour Tata Sumo parked and driven by Accused No.1 Subhash(Appellant in Criminal Appeal No.41 of 2002) and also saw one motor cycle and two scooters. He has further stated that at about 5.30 p.m. he and Salunke started back from Ponda from Pale Mine Office and on the way when they reached near Merck on the sharp left turn he found a Layland Truck blocking half

the road and a two wheeler blocking the balance of the road. He stopped his jeep behind the truck and immediately heard the sound of banging on the jeep with steel rods and stones. He immediately attempted to overtake the truck but saw one two wheeler coming from the opposite direction. Two persons climbed on the bonet of the jeep and started breaking the wind screen glass. The two riders of the two wheelers jumped from the two wheeler and ran away and the two wheeler came under the jeep. Thereafter, the two assailants dragged P.W.40, Vijay Pande and deceased Salunke from the jeep and assaulted him with stones. After he was dragged out and also assaulted by steel rods it resulted in fracture of his left forearm and right arm. Injuries were caused to the shoulder blade, his knees and legs. He has identified one Rosario D'Souza, working as a Union Leader of the assailants.

8. The learned Trial Court on consideration of the evidence of these two eye witnesses came to the conclusion that only Rosario D'Souza was identified by P.W.40, Viyaj Pande. At paragraph 37, the learned Trial Court has held " P.W.40 identified only Rosario as the assailant who assaulted him and the deceased and did not identify any of the Accused. In the absence of any evidence of an overt act on the part of any of the Accused and in the absence of any corroboration it

cannot be said that any of the Accused took part in the assault on P.W.40 and the deceased".

9. During the course of investigation, at the instance of Accused No.1, from his house one iron rod and clothes were recovered. There were blood stains on the clothes and the iron rod and on the iron rod, there were some shining particles and square pieces on the iron rod. The said iron rod seized at the instance of the Accused No.1 is M.O.14, pant M.O.15, shirt M.O.16 and towel M.O.17. The prosecution examined P.W.23, Anil Naik, as a panch witness and P.W.28, Babal Gaude, as the other panch witness. The panchanama is at Exh.PW23/A.

10. P.W.23, Anil Naik, states that on 5th January, 1999, in the afternoon, he was called by the Police to act as a panch and was taken to the Ponda Police Station. Accused No.1 alleged to have stated that he would show an iron rod, clothes and towel which he had hidden in his house and accordingly, the panchanama at Exh.PW23/A was scribed. Thereafter, the Accused took the panch and the Police in a jeep to his house in the Chowgule Colony. The Accused took out the key and opened the door and he went inside the house in the kitchen. From the kitchen, the Accused removed an iron rod and clothes. The iron rod is M.O.14, clothes

M.O.15 and M.O.16 and the towel M.O.17. P.W.23, Anil Naik, states that the Police attached all the articles and sealed them. In the cross-examination, he has admitted that the Police had told him that a murder had taken place and the Police desired to recover articles and requested his help to act as a panch. He has further admitted "the P.I. told us from where are the articles to be brought and it is from Chowgule Colony at Pale". He has also admitted in the cross-examination that the Accused removed the key from his pocket and then opened the door. He has also admitted that the Accused was wearing a banian and a short pant. He has also admitted in the cross-examination that he does not know when Xavier, the other panch signed the panchanama as after signing the panchanama, P.W.23, Anil Naik, had left. P.W.5, Ganaba Naik is a panch witness to a panchanama at Exh.PW5/A, dated 30th December, 1998, under which at the distance of 60 to 80 metres from the scene of the offence certain soft drink caps, coca cola container, newspaper pieces, four square cigarette packet cover were recovered. As per the prosecution case, the scene of the offence was pointed out by Accused No.1.

11. Admittedly, Original Accused No.1 was arrested on 27th December, 1998 by P.W.64, P.S.I. Gurudas N. Gaude. He states that after recording the

complaint and registration of the offence, he along with the staff proceeded to Pale Mines and raided the residential quarters of the workers to round up the suspected persons. The Accused No.1 was arrested from his residential quarters from Pale Mines at 8.30 p.m. on 27th December, 1998 as per the deposition of P.W.86, P.I. Mohan Naik. P.W.86, P.I. Mohan Naik, in respect of the Disclosure Statement of Accused No.1, dated 5th January, 1999, states that on 5th January, 1999, he secured the presence of two panchas and recorded the confessional statement of Accused No.1. He states that thereafter, they proceeded to the house of the Accused and from the kitchen, the Accused took out the articles. In the cross-examination, P.W.86, P.I. Mohan Naik, has admitted that the Arrest Panchanama of Accused No.1 was drawn by P.S.I. Gaude and this fact is reflected in the case diary. He has further admitted that as per the Arrest Panchanama, Accused No.1 was wearing a bead necklace and description of the clothes worn by Accused No.1. He has also admitted that in the Arrest Panchanama there is no mention that he had any loose chains, currency notes or key etc. He has further admitted in the cross-examination that he had interrogated Accused No.1 on 27th, 28th and 30th December, 1998.

12. The learned Trial Court relying on the

evidence in respect of attachment of the articles like iron rod at the instance of Accused No.1 in paragraph 37 has held that "

> "The evidence of P.W.23 where iron rod M.O.14, pant M.O.15, shirt M.O.16 and towel M.O.17 which were recovered at the instance of A-1 from his room shows that there was blood found on M.O.14 and the blood found on M.O.15, M.O.16 and M.O.17 were of 'B' group of the deceased. There is no evidence of any overt act on the part of A-1, still it establishes the presence of the Accused at the place of the incident and that he took part in the assault only against the deceased".

13. The learned Trial Court on the basis of the attachment of the iron rod and the clothes came to the conclusion that the circumstantial evidence established the presence of A-1 at the scene of the offence along with 8 to 10 persons and, therefore, held A-1 to be a member of the unlawful assembly.

14. It appears from the evidence of P.W.23, Anil NaIk, that the Police knew the place from where the said articles were to be recovered i.e. from the house of the Accused. Despite that, a show was created by the Police of the Accused making a statement in the presence of the panchas. The Accused was admittedly

arrested on 27th December, 1998, and the alleged Disclosure Statement is said to have been made on 5th January, 1999. The articles were recovered from the house of the Accused from which place he was arrested. The Accused at the relevant time was wearing a banian and shorts and is said to have opened his house with a key. No explanation is coming forth from the prosecution as to how the Accused was in possession of the key from 27th December, 1998 till 5th January, 1999. The Arrest Panchanama, as admitted by P.W.86, P.I. Mohan Naik, does not refer to a key being found with the Accused. All these circumstances, according to me, create a doubt regarding the attachment of the rod M.O.14, clothes M.O.15 and M.O.16 and the towel M.O.17 at the instance of Accused No.1. Apart from that, M.O.15 and M.O.16, have not been identified by the eye witness as the clothes of the Accused. Apart from that, assuming that the prosecution has established the factum of recovery at the instance of the Accused, still on the basis of the recovery, an inference cannot be drawn that the Accused was present at the scene of the offence and had assaulted the deceased. Such an inference is wholly impermissible. On the basis of a fact discovered, the Court could either draw an inference that it was the Accused who had kept the articles or the Accused had knowledge of the place where the articles were kept or the Accused

had seen someone keeping the articles but an inference cannot be drawn that it was the Accused who had participated in the offence particularly when the Accused has not been identified by any of the eye witnesses. Therefore, according to me, the conviction of Accused No.1, Appellant in Criminal Appeal No.41 of 2002 is unsustainable.

15. The learned Trial Court, in respect of Accused No.5, Appellant in Criminal Appeal No.46 of 2002, in paragraph 38 has observed "it cannot be said that A-5 took part in assault either on P.W.40 or on the deceased as P.W.40 was specific that he and deceased were assaulted with iron rods and the jeep was damaged with iron rod and as a danda was recovered from A-5 at the most the A-5 was a member of unlawful assembly where the jeep was damaged and not a member of the assembly to assault on deceased and P.W.40".

16. A danda, M.O.22, is alleged to have been recovered at the instance of Accused No.5 on the basis of a Disclosure Statement dated 22nd January, 1999, at Exh.PW22/A. The said danda was recovered from a bushy area. The prosecution examined P.W.28, Babal Gaude, and P.W.29, Govind Gaude, as the panch witnesses. Both the witnesses turned hostile and were cross-examined. P.W.86, P.I.Mohan Naik, has stated that he secured the

presence of two panch witnesses namely P.W.28, Babal Gaude and P.W.29, Govind Gaude, and conducted panchanama under Section 27 of the Indian Evidence Act at the instance of Accused Pandurang Hari Gaude. He stated that he recorded the confessional statement of the Accused. He has identified M.O.22, which was attached at the instance of Accused No.5. He does not speak about the Disclosure Statement nor does he speak about the place from where the danda was recovered. All that was put to him were the contradictions which were brought out in the cross-examination of P.W.28, Babal Gaude and P.W.29, Govind Gaude vis a vis the panchanama. There is no substantive evidence of P.W.86, P.I. Mohan Naik, regarding the contents of the Disclosure Statement or the attachment of the danda. Even otherwise, mere attachment of the danda at the instance of Accused No.5, cannot lead to an inference that Accused No.5 was a member of the unlawful assembly which caused damage to the jeep particularly to the absence of any substantive evidence as to the identification of the Accused as being the member of the unlawful assembly.

17. After giving my anxious consideration to the material on record as against both the Appellants, I am of the considered opinion that the prosecution has miserably failed to prove the offences for which the

Accused have been charged. The conviction of the Appellants is unsustainable in law and deserves to be quashed and set aside.

18. In the result, Criminal Appeal Nos.41 and 46 of 2002 are allowed. The conviction and sentence of the Appellants are hereby quashed and set aside and they are acquitted of the offences with which they were charged.

P. V. HARDAS, J.

RD.